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No. 80-22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ORGANIZZAZIONE NAVOBI ITALIANA
(URUGUAY), S.A. and
ORGANIZZAZIONE NAVOBI ITALIANA
Petitioners

versus

TRANS INTERNATIONAL AIRLINES
Respondent

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the ruling of the Court of Appeals that a portion of the damage award was not supported by the

evidence and was thus not recoverable as a matter of law under Indiana law deprived the Petitioners of a constitutional right to a jury trial.

2. Whether the Court of Appeals affirming the dismissal by the trial court of the Petitioners' cause of action for "tortious interference" for failure to state a claim upon which relief can be granted under state law was improper or deprived the Petitioners of a constitutional right to a jury trial.

STATEMENT OF CASE

Organizzazione Navobi Italiana ("ONI"), an Italian corporation, and its Uruguayan subsidiary, Organizzazione Navobi Italiana (Uruguay), S.A., ("ONIUSA"), filed suit in the United States District Court for the Southern District of Indiana on October 17, 1975, against Trans International Airlines ("TIA"), and other Defendants asserting various causes of action against the Defendants, including breach of contract and "tortious interference" with contract by the Defendants. The Complaint was supplemented and amended several times prior to trial. Prior to trial, all Defendants other than Trans International Airlines were granted either motions for summary judgment or dismissal. On March 19, 1979, a trial by jury was commenced which resulted in a general verdict in favor of ONI in the amount of $60,000.00 and in favor of ONIUSA in the amount of $350,000.00 as damages for breach of contract between Petitioners and Defendant TIA.

Prior to trial, only two causes of action remained of several set forth in Petitioners' Complaint and its amendments, breach of contract and tortious interference. Prior to trial, Defendant moved for a ruling on its affirmative defense of failure to state a claim upon which relief can be granted as to the tortious interference claim. (Petitioners' Appendix, A-10.) The trial Court dismissed this cause of action on the basis that it did not state a

recognizable cause of action under state law. (Petitioners' Appendix, A-23-24.)

Judgment on the verdict was entered by the trial Court on April 3, 1979, and Defendant filed appropriate post-trial motion seeking relief from the jury's findings of liability and damages. The Court denied these motions on June 12, 1979. Both parties timely appealed to the United States Court of Appeals for the Seventh Circuit. Petitioners sought review of a dismissal of the trial Court's determination of the Defendant's Motion to Dismiss as to the "tortious interference" cause of action. Defendant sought review of the damage award claiming that the award was excessive under state law and that part of the damage award was not supported by any evidence.

The Court of Appeals issued its unpublished opinion on March 14, 1980, in which it sustained the trial Court's dismissal of the Petitioners' tort claim and reduced the award of the jury on the basis that an element of the damage award was not supported by any evidence. (See Petitioners' Appendix, A-1-Court of Appeals Opinion.) The Court of Appeals denied the Petitioners' application for a rehearing on April 10, 1980. (Petitioners' Appendix, A-8.)

REASONS WHY THE WRIT SHOULD BE DENIED

I

The Court of Appeals' action in reviewing and modifying the jury award did not deprive the petitioners of a constitutional right to a jury trial and does not conflict with rulings of this Court.

Petitioners' argument that the Court of Appeals in reducing the damage award violated petitioners' Seventh Amendment right to a jury trial is without merit.

The combined judgment for the petitioners which totaled $410,000.00 was clearly made up of two elements. The first

$109,499.00 were actual out-of-pocket losses resulting from the breach of contract. The Court of Appeals did not disturb this award. The second element of the judgment was for lost profits and loss to business reputation. This is the element of damages which was disallowed by the Court of Appeals and which is the subject of this petition.

On appeal the petitioners conceded that the damages in question could not be for lost profits. This was noted by the Court of Appeals (Petitioners' Appendix, A-6). Thus petitioners' claim was limited to one for loss of business reputation. The Court of Appeals then found that there was no evidence of the value of any damages suffered by petitioners to their business reputation.

The Court of Appeals, after reviewing the record, found as follows:

> "Plaintiffs concede that the amount of the verdict exceeding $109,499 does not represent damages for lost profits.[4] TIA claims that the surplus cannot be sustained as compensation for injury to the plaintiffs' business reputation both because such losses were not forseeable and because, in any event, the amount of such losses is purely speculative.
>
> Even if damages for the injury to plaintiffs' business reputation or loss of good will are recoverable, there is virtually *no* evidence of the value of such injury. All that the record contains is the testimony of the ONI's director and ONIUSA's vice-president that such injury occurred. *Nowhere* is there an estimate of its value. Also, the record is *devoid* of any evidence upon which a reasonable estimate of the value could be made."
>
> . . .

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[4]Counsel for the plaintiffs so stated at oral argument, and admitted as much in his briefs on appeal. In his summation to the jury, counsel said that the value of plaintiffs' losses was incalculable.

(Petitioners' Appendix, A-6. Emphasis added.)

The Court of Appeals found that the record "was devoid of any evidence" upon which the jury could have made a determination of the value of any loss of business reputation. Thus the Court of Appeals found that on this *element* of damages the judgment must be reversed while leaving undisturbed the jury verdict for actual losses incurred.

Petitioners assert that their Constitutional right to a jury trial has been violated. Such is clearly not the case.

As the Petitioners concede in their brief, it is firmly established that the Court of Appeals or the trial Court has the power to review the size of a verdict and may modify the same in an appropriate case under an appropriate standard. (Petitioners' Brief at p. 6.) However, Petitioners assert that in this particular case under Indiana law, this inherent power was abused by the Court of Appeals.

In *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 21 L.Ed.2d 309, 89 S.Ct. 331 (1968), this Court stated that the Court of Appeals must make a detailed appraisal of the evidence in the record bearing on damages. The Court held:

> "[W]e appellate judges [are] not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely *there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men differ, but a question of law.*"

(393 U.S. at 159. Emphasis added.)

In the case at bar, the Court of Appeals did such, looking to the evidence in the record, and found that the record was devoid of evidence to support the award of damages for loss to business reputation. Thus, under their admittedly

inherent power, the Court of Appeals modified the verdict by eliminating the element for which there was *no evidence.*

Petitioners claim that the Court of Appeals failed to find that the jury award was "gross" or "monstrously excessive" or a "shock" to judicial authority and thus abused its admittedly inherent power. Petitioners failed to comprehend the true issue and focus on the failure of the Court to use certain key words in its unpublished opinion.

What petitioners ignore is the Court's finding that there is *no* evidence, therefore, *any* award is improper without resorting to words such as gross or shocking. As this Court has recognized in *Grunenthal*, there is an upper limit beyond which, as a matter of law, damages are excessive. 393 U.S. at 159. This is true regardless of the term of art used to describe the standard. The important point is that this Court has long recognized the inherent right of an appellant tribunal to correct an award of damages which is excessive as a matter of law.

Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952) *cert. denied*, 345 U.S. 997 (1953), restates the general rule that a Court of Appeals cannot arbitrarily reduce a damage award. 200 F.2d at 588. The key issue is whether the action of the Court of Appeals is arbitrary. If the action is not arbitrary, there is no deprivation of rights.

Galard v. Johnson, 504 F.2d 1198 (7th Cir. 1974), is supportive of this rule. Petitioners would have this Court believe that *Galard* stands for the proposition that the jury must always resolve the damages issue. However, the *Galard* Court recognized that there is an upper legal limit to a damage award, but in that particular case the Court found that the damages had not been excessive. 504 F.2d at 1202, N. 5.

The Court of Appeals in the case at bar clearly followed the standard set forth by this Court in *Grunenthal*. Though not using any phrase such as "monstrous", the Court found that

there was *no evidence* to support the award of the jury. This finding is the most serious indictment of a jury verdict that an appellant tribunal can make. The Court is not re-weighing the evidence, as the Petitioners would have this Court believe, nor is it looking for any improper motive on the part of a jury such as a compromise verdict. The Court of Appeals is stating that there was *no evidence*, directly or indirectly, to sustain the award of the jury. Such an action is certainly not arbitrary and is clearly not in violation of any Seventh Amendment right to a jury trial.

There is no Constitutional question presented to the Court in this appeal and the action of the Court of Appeals does not conflict with any ruling by this Court. To the contrary, the Court of Appeals followed the standard as set forth in *Grunenthal* when it found, not that the evidence was in conflict or was weak to support damages, but that there was no evidence to support the award of the jury and that there was no evidence upon which a jury could have made an estimate of the value of an alleged loss claimed by the Petitioners. Thus the award for these damages are not recoverable as a matter of law.

II

The Court of Appeals' review and determination of the dismissal of Petitioners' claim for "tortious interference" was based on a proper standard.

The Petitioners assert as a ground to grant certiorari that the Trial Court improperly dismissed their cause of action for tortious interference with a contract.

This case was submitted by stipulation under Indiana law. (See Petitioners' Appendix, A-6.) This Court will ordinarily accept the interpretation of state law by the Court of Appeals. *Butner v. United States*, 440 U.S. 48, 58; 59 L.Ed.2d 136, 143; 99 S.Ct. 914 (1979). *Byrd v. Blue Ridge Rural Electric Co-op, Inc.*, 356 U.S. 525, 529-30, 2 L.Ed.2d 953, 958, 78 S.Ct. 893, *reh. denied*, 357 U.S. 933, 2 L.Ed.2d 1375, 78 S.Ct. 1366 (1958).

The Respondent submits that the Petitioners have improperly characterized the action of the Court of Appeals in this section of their brief and their editing of the Court of Appeals opinion changes its meaning. Concerning the dismissal of the Petitioners' cause of action for "tortious interference", the Court ruled:

> "Plaintiffs contend that the district court should not have dismissed their tort claim and that the district court's failure to allow them to reinstate it was an abuse of discretion. We disagree. Under the circumstances of this case, TIA is not liable in tort for the negative effects its breach of contract may have had on the plaintiffs' contractual relationships with third parties. See generally Prosser, Law of Torts §129 (4th ed. 1971). Moreover, plaintiffs failed to *allege* any conduct on the part of TIA which interfered with their business relationships with any outside party. The district court's grant of partial summary judgment for the defendant on this aspect of the case was proper and is affirmed."

(Petitioners' Appendix, A-7. Emphasis added.)

The Petitioners' statement on page 13 of their brief that the Court of Appeals "obviously" reviewed the factual sufficiency of the cause of action is not what the Court of Appeals did from a plain reading of the opinion. The Court found that the Petitioners failed to "allege" a cause of action.

The Respondent perceives no ambiguity in the Court of Appeals' ruling. The Court of Appeals found, as did the Trial Judge, that under Indiana law, the pleadings filed as the Petitioners' cause for tortious interference failed to allege a cause of action recognized under Indiana law. The Court did not review evidence to reach this ruling, but relied on Petitioners' allegations. No constitutional question is presented by the Court of Appeals' determination that the Petititioners' cause of action for

"tortious interference" failed to state a claim under Indiana law.

CONCLUSION

Respondent submits that certiorari should not be granted in the case at bar. The Petitioners have presented no Constitutional questions for this Court to consider nor have they shown any conflict with existing decisions of this Court.

The Respondent submits that the petition for a writ of certiorari should be denied.

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